Supreme Court, U.S.
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No. 86-1680

In the

Supreme Court of the United States

October Term, 1987

NICOLET INSTRUMENT CORPORATION,
a Wisconsin corporation,

Petitioner,

vs.

BIO-RAD LABORATORIES, INC.,
a Delaware corporation,

Respondent.

PETITIONER'S REPLY BRIEF

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BIO-RAD LABORATORIES, INC.,
a Delaware corporation,
Respondent.

NICOLET INSTRUMENT CORPORATION'S REPLY TO BIO-RAD LABORATORIES, INC.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT AND APPENDIX

Nicolet submits this Brief Reply in response to Bio-Rad's Brief in Opposition to Nicolet's Petition for a Writ of Certiorari in the above-referenced case. Bio-Rad's appendix and recitation of the facts does not characterize accurately Judge Burke's rationale in limiting the award of prejudgment interest in this case. As the appendix accompanying this Reply Brief indicates, the trial court's rationale in limiting the award of prejudgment interest to Bio-Rad was based clearly and unequivocally upon Bio-Rad's abuse of the discovery process. Bio-Rad's Reply Brief also contains a number of other inaccuracies and misstatements. Nicolet does not, however, deem them relevant at this stage.

Respectfully submitted,

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Civil Action No. C-81-2553-LHB

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE: THE HONORABLE LLOYD H. BURKE, JUDGE

BIO-RAD LABORATORIES, INC.,
a Delaware corporation,

Plaintiff,

v.

NICOLET INSTRUMENT CORPORATION,
a Wisconsin corporation,

Defendant.

REPORTER'S TRANSCRIPT
September 13, 1985
Pages 5 through 7

TRANSCRIPT OF PROCEEDINGS

THE COURT: I think I have lived with this case long enough to be familiar with the issues, and reasonably prepared to dispose of the matter of the prejudgment interest at this time here, I would like to hear from counsel.

I've read the voluminous memorandum filed by both sides, but frankly I think no precise figure can be arrived at with even limited certainty.

It is possible I could save some time by indicating my present frame of mind so far by some of the attempts made by Nicolet in its briefs following the trial.

I am satisfied that there was an unjustified delay in the part of Bio-Rad in meeting the standards of discovery in a reasonable fashion during pre-trial hearings. The question in my mind is only as to how far the Court under these circumstances should go in denying what might otherwise be an appropriate application of interest rate for pre-judgment damages, and whether or not the interest should be forgone in its entirety, or some portion of it should be eliminated. And if so, what standard should have application, remain matters of some concern to me.

I believe, Mr. Cook accurately stated that the contentions of Nicolet cannot be used insofar as they are directed to the issue as to whether or not the non-producing of documents would affect the outcome of the trial.

I don't think that the arguments made by Nicolet are necessarily designed to accomplish that. I think that the thrust of Nicolet's use of the pre-trial discovery misconduct is appropriate descriptive material. To establish that damages should be reduced, that damages in the form of interest should be reduced or completely nullified, by reason of such misconduct. As far as the rules of the trial are concerned, "the horse is out of the barn" in the vernacular, and it's too late to do anything about that. But I think that, in substance at least, they did sustain injury enough with the misconduct without having to pay interest on interest with no consideration given to the fact that the pretrial delay of Bio-Rad producing was what might be called delay constituting abuse of the discovery process, or resistance to discovery process.

Some of the briefs are a little heated. I would hope that they can be disposed of in a dispationate fashion. My office demands that I hear what you have to say. At any rate, go along with your theory. It should be considered as pre-trial evidence and should be considered, but not for the purpose of changing the verdict or determining what would otherwise would be the appropriate amount of interest. Quite obviously the denial of pre-judgment interest is, in a sense, a penalty that cannot be imposed. I don't know what alternative to give something to which they are not entitled, although they may submit it.